

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS J. BURKE and ELAINE BURKE,

Plaintiffs/Counter-Defendants-
Appellees,

v

MARK BROOKS,

Defendant/Counter-Plaintiff/Cross-
Defendant/Cross-Plaintiff-
Appellant,

and

JUDY BROOKS

Defendant/Cross-Plaintiff/Cross-
Defendant-Appellee.

UNPUBLISHED

April 22, 2008

No. 274346

Wayne Circuit Court

LC No. 00-032608-CK

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

In this breach of contract action, defendant Mark Brooks appeals from a judgment denying him receipt of the title of the “Florida condominium” property owned by plaintiffs. This case arises from an agreement by plaintiffs, Tom and Elaine Burke, to sell their Florida condominium to their daughter and son-in-law, Judy and Mark Brooks, for the purchase price of \$180,000 less the initial deposit of \$1,000. The agreement specified that the balance of \$179,000 be paid in full within 36 months from closing. However, the agreement, by its written terms, did not state the amount of each of the installment payments nor when those payments were to be made.

Plaintiffs brought this suit alleging that defendant’s failure to make the monthly installments breached the agreement and sought equitable relief to remain as the titleholders to their property. Defendant filed a counterclaim alleging that plaintiffs’ failure to deliver the deed after the closing constitutes a breach, and the agreement does not impose any monthly payment obligations.

Ultimately, the jury determined that defendants, Judy and Mark Brooks, were in breach of the agreement. The jury's verdict, however, did not address any possible remedies. Consistent with the jury's verdict, the trial court granted equitable relief to plaintiffs and ordered defendants to reimburse plaintiffs for expenses incurred and refund the rental revenue received by defendants. We affirm.

On appeal, defendant raises five issues. First, defendant claims that the trial court erred by precluding him from redeeming the property under the forfeiture statute, MCL 600.5744, by using the escrowed funds. We disagree.

On appeal, this Court reviews questions of statutory interpretation de novo. *Herald Co v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006). Additionally, to evaluate the trial court's discretionary determinations, we defer to the trial court's decision unless there was an abuse of discretion. *Id.* at 472.

On appeal, defendant tries to style plaintiffs' complaint as a "forfeiture" action on the basis of the trial judge's references to "forfeiture." However, the trial court made no such formal finding or ruling in an order. The trial court's references may have had a subliminal effect, but "a court speaks through its written orders." *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). Therefore, defendant had no right of redemption because this case was not filed under the summary proceeding statute, MCL 600.5701 *et seq.* While it may well be true that defendant could have redeemed this property from forfeiture, that fact is moot because this was not a forfeiture action.

Next, defendant argues that the trial court abused its discretion in awarding equitable relief by granting the title to plaintiffs when an adequate remedy at law exists. Defendant further contends that plaintiffs have unclean hands, thereby precluding them from an equitable relief. We disagree.

On appeal, the trial court's decision to grant or deny equitable relief is reviewed de novo, and the court's factual findings are reviewed for clear error. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). To determine whether the trial court abused its discretion to award plaintiffs the title to the property, the Court "looks at the whole situation, and grants or withholds relief as good conscience dictates." *Thill v Danna*, 240 Mich 595, 597; 216 NW 406 (1927).

In the case at bar, the jury found defendants in breach of the agreement. On appeal, defendant does not contest the jury's factual determinations, but argues that despite the fact that the jury found him to be in breach of the agreement, the appropriate remedy was to award plaintiffs the escrowed funds and other money damages. We disagree.

A rescission is an avoidance of a transaction. The trial court rescinded the agreement, thus allowing both parties to be in the same position as they would have been if they had never entered into the contract. Defendant concedes that the remedy elected by the trial court was well within the court's discretion, but he maintains that the judgment contradicts the trial court's factual findings in support of its attempt to "do equity." Defendant argues that the trial court failed to set forth facts and conclusions of law to justify equitable relief, which violates MCR 2.517. Pursuant to MCR 2.517(A)(2), "brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over-elaboration of detail or particularization of

facts.” In the case at bar, the judgment entered by the trial court, although providing a succinct basis for its conclusion, does not violate MCR 2.517.

In *Holtzlander v Brownell*, 182 Mich App 716, 722; 452 NW2d 295 (1990), this Court held that “in order to warrant rescission, there must be a material breach affecting a substantial or essential part of the contract.” In determining whether a breach is material, among other factors, we examine whether the non-breaching party obtained the benefit, which he or she reasonably expected to receive. *Walker & Co v Harrison*, 347 Mich 630; 81 NW2d 352 (1957). In this case, defendant defaulted on the material purpose of the agreement, because all that plaintiffs expected to receive from this agreement were monthly installments. Plaintiffs did not receive the benefit of the bargain; defendant paid merely \$35,000, in return received rental revenue from the property, and held possession since 1998.

The grant or denial of rescission is not a matter of right, but rather lies within the sound discretion of the trial court. *Wronski v Sun Oil Co*, 89 Mich App 11, 29; 279 NW2d 564 (1979). The equitable nature of rescission does not always invoke the adequacy of the legal remedies test. Based on the jury’s verdict, the trial court properly concluded that defendants relinquished any right they had in the property since they breached the agreement. Property is considered unique in character and quality; therefore, equitable relief is proper. See *In re Smith Trust*, 480 Mich ____; ____ NW2d ____ (Docket No. 133462, decided 3/19/08), slip op at 4.

Defendant also argues that plaintiffs are not entitled to equitable relief on the theory of unclean hands. Defendant’s application of the equitable defense of unclean hands is based on the violation of a temporary restraining order entered in Judy and Mark Brooks’ divorce claim. Defendant alleges that plaintiffs’ effort to divert the rental income by sending a letter to the rental agent was in violation of the temporary restraining order, thus precluding them from an equitable relief. We disagree.

Michigan courts have not deviated from the application of this doctrine that “the one who seeks the aid of equity must come in with clean hands.” *Charles E Austin, Inc v Secretary of State*, 321 Mich 426, 435; 32 NW2d 694 (1948). However, the trial court denied the application of unclean hands in its entirety to the case at bar. This litigation is to resolve an ownership interest in the property, not the stream of income derived from it. A right over rental income is collateral to the subject matter of the relief sought. Therefore, the clean hands doctrine does not apply in this case. For the above reasons, we conclude that the award of equitable relief was within the trial court’s proper exercise of discretion.

Defendant next argues that the trial court erred in ordering the escrow of funds. But, even if the trial court improperly ordered defendant to escrow the funds, there is no relief that we can grant at this point, because the escrow account is dissolved. We can, however, address defendant’s argument regarding the prejudicial effect of Thomas Burke’s testimony. Defendant argues that he was entitled to mistrial because plaintiff suggested to the jury that the trial court’s ordering of the escrow account was based on its findings that defendants had breached the contract. We disagree.

The standard of review whether to grant or deny a motion for mistrial for evidence introduced at trial is abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). Defendant relies on *Secrist v City of Detroit*, 299 Mich 393,

397-398; 300 NW 137 (1941), which holds that when a witness's statement precludes the possibility of a fair trial, the important consideration for a new trial requires an analysis of whether, "the offending party *continued to offer* the same inappropriate remark even after the trial court provided a curative instruction" (emphasis added).

Defendant further claims that plaintiffs' "continued references" to the escrow order caused an impartial trial. But, defendant fails to cite specific instances in the record to show plaintiffs' continued misconduct. We have frequently stated that a mere statement of position without supporting authority is insufficient. *Spires v Bergman*, 276 Mich App 432, 444; 741 NW2d 523 (2007). The record before us shows that the trial court on several occasions instructed the jury that the existence of the escrow order did not establish that defendant breached the contract. Therefore, the only circumstance offered by defendant for this Court to justify grounds for reversal is Thomas Burke's brief remark.

Our Supreme Court has held that a voluntary and irresponsive answer to a proper question is not error meriting a mistrial. See *Hill v Robinson*, 23 Mich 24 (1871); *People v Wilson*, 133 Mich 517 (1903). Thomas Burke's reference to the escrow order was short-lived and does not show reversible prejudice. Therefore, in light of evidence in the record, we agree with the trial court that a brief inflammatory reference, which was properly cured by jury instructions, does not constitute error requiring reversal.

In his fourth issue, defendant maintains that the trial court abused its discretion by allowing plaintiffs to read, during closing argument, the definition of the word "installments" from Black's Law Dictionary. Defendant argues that what plaintiffs and defendants may have intended by the word "installment" can only be drawn from the testimony. We disagree.

The issue whether the contract language is ambiguous is a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency*, 468 Mich 459; 663 NW2d 447 (2003). This Court reviews the trial court's ruling with regard to opening and closing arguments for an abuse of discretion. *Wilson v General Motors Corp*, 183 Mich App 21, 27-28; 454 NW2d 405 (1990).

It is appropriate to use dictionaries in determining meanings of well-recognized terms. See *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 469; 521 NW2d 831 (1994), wherein the Court stated, "reference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is." *Id.* Further, it is within the trial court's discretion to allow counsel to make appropriate references, but allowance must be accompanied by proper instructions. *Campbell v Menze Constr Co*, 15 Mich App 407, 409; 166 NW2d 624 (1968).

The trial court gave jury instructions stating that the court was responsible for all matters of law. The reference to the definition did not contradict the term, and defendant acknowledges in his brief that the definition was not admitted as evidence in the closing argument. Counsel is not forbidden to make references to law in oral argument. This Court has held that such discussion is often essential to the jury's understanding of the evidence's significance. See *Moody v Pulte Homes, Inc*, 423 Mich 150, 157; 378 NW2d 319 (1985). The proper and applicable law was clearly and fully covered by the court's instructions.

In short, the trial court's decision to allow plaintiffs to read the definition from Black's for the purposes of aiding in the interpretation of the language in the agreement was not an abuse of discretion.

Finally, defendant argues that the trial court abused its discretion by denying an evidentiary hearing and overruling his objection to certain portions of the Special Master's Report that lacked documentary corroboration. Further, defendant argues that Judy Brooks should have equally shared the expenses of the Special Master. We disagree.

When reviewing a trial court's finding in support of an award of damages, a clearly erroneous standard of review applies. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995). On this issue, defendant clearly fails to provide specific details regarding his claim. Defendant cites two cases and makes a sweeping argument on their application to the case at bar. Defendant refers to *City of Ferndale v Ealand*, 88 Mich App 107, 112; 267 NW2d 534 (1979), to argue that evidence introduced and admitted during the evidentiary hearings held by the Special Master violated the best evidence rule. Defendant does not state his proposed argument, but states that due to the trial court's denial of another evidentiary hearing it was an abuse of discretion.

Defendant simply cites to the exhibits, and attempts to argue that the Special Master's opinion and the trial court's ruling are erroneous. In order to properly review this issue, by simply referencing exhibits without asserting the basis of each claim, it is not just difficult, but impossible to discern defendant's argument. Additionally, in support of his argument that a "party must establish damages with reasonable certainty," defendant refers this Court to *Valentine v General American Credit, Inc.*, 420 Mich 256, 261-263; 362 NW2d 628 (1985). Defendant incorrectly relies on this case, because it dealt with mental distress damages for breach of contract. The application of *Valentine* to the issues of expenses is difficult to discern.

Pursuant to MCR 2.613(C), "[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." At the final hearing, before the trial court entered the judgment, it carefully considered the Special Master's report, including the transcripts of the evidentiary hearing. The only provision the trial court modified from the Special Master's report was in favor of defendant.

On the issue of apportioning costs for the Special Master between defendant and Judy Brooks, defendant gives no legal authority. Because defendant fails to properly brief this issue by failing to set out any argument or authority supporting his claim of error, this issue is waived for appellate review. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 407; 651 NW2d 756 (2002).

Accordingly, we believe that the trial court properly granted title to the Florida condominium to plaintiffs.

Affirmed. Plaintiffs may tax costs.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood